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*Kevin Smith*

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**BRADFORD, Judge**

Appellant-Defendant Marquis T. Hawkins appeals following his conviction for Domestic Battery, a Class D felony.<sup>1</sup> On appeal, Hawkins contends that the trial court abused its discretion in admitting a pretrial testimonial hearsay statement and that the evidence was insufficient to support his conviction. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

At all times relevant to this appeal, Jamie Hunt and Marquis Hawkins lived together, as each other's spouse, in an apartment in Fort Wayne with Hunt's three-year-old daughter J.H. Hunt's mother, Joann Kennedy, lived in Missouri. Kennedy's sister, Shannon Conner, lived in Fort Wayne.

On the evening of January 26, 2007, Hunt and Hawkins argued about who would go out that evening and who would stay home with J.H. The argument eventually became violent with Hawkins grabbing and holding Hunt down and J.H. telling Hawkins to "get off Mommy." Tr. p. 76. At some point, Kennedy spoke to J.H., who was in the apartment with Hawkins and Hunt, on Hawkins's cellular telephone. Following her conversation with J.H., Kennedy called emergency authorities in Fort Wayne and reported a possible domestic disturbance. Kennedy also called Conner and asked her to go and check on Hunt. When Connor arrived at Hunt's apartment, J.H. was still holding Hawkins's cellular telephone. Conner noticed that Hunt's face was swollen, so she grabbed J.H., used the cellular telephone to call 911, and left the apartment with J.H.

Fort Wayne Police Officer Alisia Wallace responded to the alleged domestic

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<sup>1</sup> Ind. Code § 35-42-2-1.3 (2007).

disturbance. As Officer Wallace approached the residence, she heard a female crying and a male speaking. Officer Wallace was met at the door by Hunt, who had a severely swollen left cheek. Officer Wallace “asked if there was anybody else inside and saw that there was a male inside and walked in and placed him in handcuffs and had him sit down.” Tr. p. 35. Officer Wallace asked Hunt to come outside in the hallway so that she could speak with her. Officer Wallace asked Hunt “what happened to her face.” Tr. p. 36. Hunt told Officer Wallace “I got my ass beat” by Hawkins. Tr. p. 36, 41.

On July 31, 2007, the State charged Hawkins with domestic battery as a Class D felony. Hawkins waived his right to a jury trial on February 27, 2008, and on May 12, 2008, the trial court conducted a bench trial. The trial court found Hawkins guilty of Class D felony domestic battery and sentenced Hawkins to eighteen months of incarceration.

## **DISCUSSION AND DECISION**

### **I. Admissibility of Evidence**

Hawkins contends that the trial court abused its discretion in admitting Hunt’s pretrial statement to Officer Wallace that, “I got my ass beat.” Tr. p. 36, 41. “The admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court’s determination only for an abuse of that discretion.” *Collins v. State*, 873 N.E.2d 149, 153 (Ind. Ct. App. 2007), *trans. denied*. “An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court.” *Id.*

Hawkins claims that the admission of Hunt’s out-of-court statement, as repeated in

Officer Wallace’s testimony regarding her initial conversation with Hunt, violates his Sixth Amendment right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36 (2004). Under the rule announced in *Crawford*, the Sixth Amendment does not permit the admission of “testimonial” statements of a witness who does not appear at trial unless he or she is unavailable to testify and the defendant had a prior opportunity for cross-examination of the witness. *Id.* at 53-54. Therefore, the question in the instant case is whether Hunt’s statement to Officer Wallace was testimonial or nontestimonial.

While the Supreme Court did not define the terms “testimonial” and “nontestimonial” in *Crawford*, it later explained the distinction in *Davis v. Washington*, 547 U.S. 813 (2006):

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822. In concluding that the statements at issue in *Davis* were not testimonial, the Supreme Court considered several factors: (1) whether the declarant was describing past events or current events, (2) whether the declarant was facing an ongoing emergency, (3) whether the questions asked by law enforcement were such that they elicited responses necessary to resolve the present emergency rather than learn about past events, and (4) the level of formality of the interrogation.<sup>2</sup> *Id.* at 827.

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<sup>2</sup> “We do not mean to suggest that the four factors relied upon by the *Davis* court represent an exhaustive list, that all four will be relevant in all cases, or that they represent ‘elements’ that must all be satisfied before testimony can be determined to be nontestimonial.” *Collins*, 873 N.E.2d at 154 n.2.

In *State v. Martin*, 885 N.E.2d 18 (Ind. Ct. App. 2008), this court concluded that the trial court abused its discretion in excluding the victim's initial statement to police because it was nontestimonial. The facts in *Martin* establish that a passerby called 911 after observing the victim exit a vehicle at a stop light with blood and saliva streaming out of her mouth. *Id.* at 19. The victim appeared to be "very shaken and upset." *Id.* Officers responded to the call and arrived on the scene within minutes of dispatch only to find the victim sitting on a fencepost near the road, crying hysterically. *Id.* The victim told the officers that "her boyfriend had struck her in the face during an argument in the car" and that "while she was trying to remove their children from the car, he had driven off with the car door open." *Id.* The victim described the car and provided the defendant's full name to the officers who communicated the information to other officers in the area. *Id.* The officers believed that the victim was concerned for her children's safety, and were themselves concerned about the defendant's actions and whereabouts because they did not know what the defendant's state of mind. *Id.* Given these facts, the *Martin* court concluded that the victim's statements were nontestimonial and should have been admitted because they were uttered for the purpose of assisting the police in resolving an ongoing emergency.

Likewise, in *Collins v. State*, this court concluded that a witness's statement was properly admitted at trial because it was nontestimonial. 873 N.E.2d at 155. The facts in *Collins* establish that the witness at issue was a passenger in a vehicle when the defendant shot the victim in the head, killing her. *Id.* at 152. A few hours later, the witness called 911 and told the dispatcher that he had watched the defendant shoot the victim. *Id.* at 152-53.

The witness identified himself and told the dispatcher that the shooting had occurred in a white vehicle, that he did not know where the Defendant was, and that the Defendant had told him that “if he said ‘anything to anyone’ he would kill him.” *Id.* at 153. In light of the witness’s tone and repetition of sentences, the dispatcher concluded that the witness was “very upset.” *Id.* The witness’s statements to the dispatcher were admitted at trial. On appeal, the defendant challenged the inclusion of these statements, claiming that they were testimonial. *Id.* We concluded that the witness’s statements to the dispatcher in the 911 call were nontestimonial because they were spoken for the purpose of notifying police of an ongoing emergency. Therefore, the admission of the witness’s statements did not violate the Defendant’s Sixth Amendment rights. *Id.* at 155.

On appeal, Hawkins claims that the trial court abused its discretion in admitting Hunt’s statement that she “got her ass beat” by Hawkins because it is testimonial. Applying the first of the *Davis* factors, we observe that although Hunt spoke in the past tense, it was an explanation of the circumstances at issue to Officer Wallace, who was responding to a 911 call, and it was relevant to Officer Wallace’s assessment of the situation at hand. Second, Officer Wallace’s questions were in an effort to determine whether Hunt was facing an ongoing emergency. Hawkins and Hunt were the only two adults present when Officer Wallace was dispatched to the alleged domestic disturbance at their apartment, and Hunt was noticeably injured. Officer Wallace needed to ask Hunt what happened in order to determine whether Hunt faced an ongoing emergency or further abuse if left home alone with Hawkins. Third, Officer Wallace’s question eliciting Hunt’s statement was merely “what happened to

[your] face” suggesting its focus was upon addressing the emergency situation at hand rather than eliciting a detailed recitation of past events. Finally, at the time of her conversation with Officer Wallace, Hunt was at the site of the emergency situation. She was severely bruised and crying. There was little formality to this situation. In sum, the circumstances surrounding Officer Wallace’s conversation with Hunt objectively indicate that the primary purpose of the conversation was to assist police in meeting an ongoing emergency. As such, Hunt’s statement was nontestimonial and its admission therefore did not violate Hawkins’s Sixth Amendment rights.

## **II. Sufficiency of the Evidence**

Hawkins also contends that the evidence was insufficient to support his Class D felony domestic battery conviction. Our standard of review for a challenge to the sufficiency of the evidence is well-settled. *Cline v. State*, 860 N.E.2d 647, 649 (Ind. Ct. App. 2007).

We will not reweigh the evidence or judge the credibility of the witnesses, and we will respect the [finder of fact’s] exclusive province to weigh conflicting evidence. Considering only the evidence and the reasonable inferences supporting the verdict, our task is to decide whether there is substantial evidence of probative value from which a reasonable [finder of fact] could find the defendant guilty beyond a reasonable doubt.

*Id.*

Indiana Code section 35-42-2-1.3 provides that a person who knowingly or intentionally touches an individual who is or was living as a spouse of the other person in a rude, insolent, or angry manner that results in bodily injury, in the presence of a child less than sixteen years of age, knowing that the child was present and might be able to see or hear

the offense, commits domestic battery, a Class D felony. Hawkins concedes that he and Hunt were living together as each other's spouse but claims that the evidence was insufficient to prove that he battered Hunt and that J.H. was present during the alleged battery. The evidence most favorable to Hawkins's conviction, however, is sufficient to prove not only that Hawkins battered Hunt, but also that he did so in the presence of J.H.

The evidence established that Hawkins grabbed Hunt, held her down, and beat her in the presence of her three-year old daughter, J.H. Officer Wallace testified that upon her arrival, Hunt informed her that she "got her ass beat" by Hawkins. Tr. p. 41. Hawkins admitted to Detective Shane Hopkins that he and Hunt were arguing, that their argument became violent, and that he grabbed her and held her down. Multiple pictures illustrating the injuries that Hunt received as a result of the battery were admitted as evidence at trial. These pictures show substantial injuries to Hunt's face, as well as bruises to Hunt's arms and legs. In addition, Hawkins told Detective Hopkins that J.H. told him to "get off Mommy." Tr. p. 77. Also, when Collins arrived at the apartment to check on Hunt, Collins saw bruises on Hunt's face, causing her to remove J.H. from the apartment. This evidence is sufficient to prove that Hopkins battered Hunt and that he did so in the presence of J.H., Hunt's three-year-old daughter.

Having concluded that the trial court acted within its discretion in admitting Hunt's out-of-court statement to Officer Wallace on the grounds that it did not violate Hawkins's Sixth Amendment rights, and also that the evidence was sufficient to support Hawkins's Class D felony domestic battery conviction, we affirm the judgment of the trial court.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.